83-1934

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ELAINE RIDDICK,

Petitioner,

v.

CLIFTON CRAIG, JACOB KOOMEN, M.D.,
R. L. ROLLINS and SUE CASEBOLT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Did *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982) eliminate the subjective element of the qualified immunity defense available to state officials in actions brought under 42 U.S.C. § 1983?

2. Are state officials, who ordered the sterilization of a 14 year old black girl who had become pregnant after being raped, entitled to immunity if they acted in "subjective good faith" in ordering the sterilization without notice or an opportunity to be heard and by applying a racially unfair standard to a palpably inadequate record?

INDEX

TABLE OF AUTHORITIES

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on January 12, 1984.

OPINION BELOW

The opinion of the court of appeals affirming the judgment entered in the district court (App. A1-A3) and the prior opinion of the court of appeals reversing the district court's grant of summary judgment to respondents (App. A4-A7) are unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a). The judgment of the court of appeals was entered on January 12, 1984 (App. A8), a timely petition for rehearing was denied on February 24, 1984. (App. A9.)

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This case involves the due process clause of the Fourteenth Amendment to the Constitution of the United States.

This case also involves the "North Carolina Eugenics Act," N.C.Gen.Stat. § 35-36 et seq. (1968) reproduced in the appendix *infra*, A10-A21.

STATEMENT

Petitioner is a 30 year old black woman who became pregnant at age 13 after being raped. Petitioner, the holder of a two year associate degree from a community college, was sterilized in 1968 pursuant to an *ex parte* order of the "Eugenics Board of North Carolina," entered upon a finding that petitioner was "feebleminded."[1]

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[1] The order of the Eugenics Board was entered under color of the Carolina Eugenics Act then in effect, N.C.Gen.Stat. § 35-36 et seq. (App. A10-A21.) The Act authorized the sterilization of

> any mentally diseased or feebleminded resident of the county, not an inmate of any public institution, upon the request and petition of the director of public welfare or other similar public official performing in whole or in part the functions of such director, or the next of kin, or the legal guardian of such mentally defective person. (N.C.Gen.Stat. § 35-37.)

The expert who testified on behalf of respondents at trial conceded that the definition of "feebleminded" used by the Eugenics Board in this case would have included half of the black population of North Carolina.

Respondents, members of the Eugenics Board and its executive secretary, relied upon a "consent" form signed by petitioner's father—who respondents knew was partially mentally disabled and who respondents knew did not have legal custody of petitioner—to order petitioner's sterilization without notice and without furnishing petitioner with a right to be heard.[2]

At trial, petitioner contended, *inter alia*, that respondents had "ordered her sterilization without due process of law when they accepted a consent form signed by plaintiff's father and made their decision on the basis of factual assertions which had not been submitted in writing and under oath to the Eugenics Board."[3] (Pre-trial Order, ¶ 1(a).) The district judge, over petitioner's timely exception, charged the jury that subjective good faith was a complete defense (App. A3 n.2):

> If the defendant reasonably believed that he was acting in conformity with the General Statutes of North Carolina as they existed at the time the action was taken, and acted in good faith on the basis of this belief, then his reasonable belief and good faith action would constitute a defense to the plaintiff's claim.

In a brief per curiam opinion (App. A1-A3), the court of appeals held that this charge "was adequate under the Supreme

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[2] The North Carolina Eugenics Act required that the person whose sterilization was sought be permitted to attend a hearing on the petition, and expressly recognized the right to representation by counsel at that hearing. (N.C.Gen.Stat. 35-45, App. A15-16.) The Board's practice was to hold such a hearing unless the person whose sterilization was sought had personally signed a "consent of patient" form. Respondents ordered petitioner's sterilization without her presence at a hearing and without her written waiver of her right to be heard.

[3] The statute required that sterilization petitions be submitted in writing and sworn to under oath. (N.C.Gen.Stat. § 35-43, App. A13-A14.) As the court of appeals found in its initial decision in this case (App. A4-A7), the summary of the petition prepared by the Board's executive secretary "set forth data not supported by other documents." (App. A7.)

Court's decision in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982)." (App. A3.) During the pendency of a petition for rehearing, the court of appeals amended its opinion to add footnote 2, in which it reaffirmed its view that *Harlow* "did not hold that an *exclusively* objective standard was to be applied to claims that proceeded to trial." (App. A3 n.2.) (emphasis in original)

REASONS FOR GRANTING THE WRIT

This case presents an important question about the qualified immunity defense available to state officials in actions brought under 42 U.S.C. § 1983. Certiorari should be granted to resolve the conflict between the circuits as to the relevance of subjective good faith in light of the Court's decision in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982).

In *Harlow*, the Court appeared to limit the qualified immunity defense to "the objective reasonableness of an official's conduct," 457 U.S. at 818, i.e., whether the defendant's conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." Id.

That respondents' conduct violated petitioner's "clearly established statutory or constitutional rights" is undisputed in this case.[4] What is at issue is whether respondents where

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[4] Petitioner's rights were "clearly established" as a matter of statutory and constitutional law.

The North Carolina Eugenics Act required that the Board provide notice and an opportunity to be heard to the person whose sterlization was sought. See note 2 *ante*. In addition, in 1968, North Carolina prohibited the voluntarily sterilization of a minor child without that child's written consent and approval by a juvenile court judge. N.C. Gen. Stat. 90-272. Moreover, the statute expressly mandated a thirty day "cooling off" period after judicial approval before a sterilization could be performed. N.C. Gen. Stat. 90-273.

In addition, as the Fourth Circuit held in *Cox* v. *Stanton*, 529 F.2d 47, 50 (4th Cir. 1975), petitioner's constitutional right to bear children had been established by the decision of this Court in *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942). That "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the

(Footnote continued on following page)

entitled to a jury instruction that their subjective good faith would be a complete defense.[5]

In the view of the First Circuit, a jury instruction on subjective good faith is "superfluous" under *Harlow*. *Stathos* v. *Bowden*, 728 F.2d 15, 19 (1st Cir. 1984). The Fifth Circuit has endorsed this view, holding that once the court has determined that the law was "clearly established" at the time of the incident, "the only jury issue would be framed as the objective immunity standard of *Harlow* v. *Fitzgerald*." *Trejo* v. *Perez*, 693 F.2d 482, 488 (5th Cir. 1982). The same result was recently reached by the Seventh Circuit in *McKinley* v. *Trattles*, ____ F.2d ____ (7th Cir., No. 83-1345, April 23, 1984), where the court concluded that an official's "testimony that he believed, in good faith, that his conduct was authorized by the rules and regulations of the prison, is legally irrelevant to the immunity issue in this case." (slip op. 6.)

The view of the First, Fifth, and Seventh Circuits that subjective good faith is "superfluous" or "legally irrelevant" to the qualified immunity defense appears to be shared by the

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(Footnote continued from preceding page)

circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," had been "clearly established" in *Mullane* v. *Central Hanover Bank & Trust Co.* 339 U.S. 306, 314 (1950). Petitioner's constitutional entitlement as a minor child "to the procedural regularity and exercise of care implied in the phrase 'due process' " was "clearly established" by this Court in *In re Gault*, 387 U.S. 1, 27-28 (1967). Finally, the principle that "[n]otice to a person known to be an incompetent who is without the protection of a guardian does not measure up to [constitutional standards of procedural due process]" was "clearly established" by this Court in *Covey* v. *Town of Sumers*, 351 U.S. 141, 147 (1951).

[5] The "good faith" instruction given by the district court (App. A3 n.2) set out the "defense of good faith and probable cause . . . available to the [police] officers in the common-law action for false arrest and imprisonment." *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967.)

Courts of Appeals for the Third, Sixth, Eighth, Ninth, Tenth, Eleventh, and District of Columbia Circuits.[6]

The Fourth Circuit, however, has adopted a conflicting view. In *McElveen* v. *County of Prince William,* 725 F.2d 954 (4th Cir. 1984), certiorari pending, No. 83-1723, the Fourth Circuit concluded that *Harlow* "did not hold that an *exclusively* objective standard was to be applied to claims that proceeded to trial." Id. at 958. (emphasis in original). This reasoning was applied and reaffirmed by the Fourth Circuit in this case (App. A3 n.2), where the court of appeals approved a jury instruction on subjective good faith. A similar conclusion was reached by a divided panel of the Second Circuit in *Anderson* v. *Coughlin,* 700 F.2d 37, 44 (2d Cir. 1982) ("in order to be immune from damage actions the executive official must have had a good faith belief that he was acting properly and there must have been reasonable grounds for that belief in light of all the circumstances as they reasonably appeared at the time").

This case provides an appropriate vehicle for resolving this conflict among the circuits. The evidence at trial left no question that respondents should have known that it was unlawful to order petitioner's sterilization without a hearing on the basis of a "consent" form signed by petitioner's father, who respondents knew was partially mentally disabled and who did not have legal custody of petitioner.[7] But for the "legally irrelevant" question of respondent's subjective good faith, *McKinley* v. *Trattles, supra,* slip op. 6, petitioner should be entitled to judgment against respondents as a matter of law.

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[6] *Czurlanis* v. *Albanese,* 721 F.2d 98, 108 n.8 (3d Cir. 1983); *Smith* v. *Heath,* 691 F.2d 220, 226 (6th Cir. 1982); *Miller* v. *Solem,* 728 F.2d 1020, 1024 (8th Cir. 1984); *Fujiwara* v. *Clark,* 703 F.2d 357, 359 n.3 (9th Cir. 1983); *Coleman* v. *Turpin,* 697 F.2d 1341, 1344 (10th Cir. 1982); *Barnett* v. *Housing Authority of City of Atlanta,* 707 F.2d 1571, 1581-83 (11th Cir. 1983); *McSurely* v. *McClellan,* 697 F.2d 309, 316 (D.C. Cir. 1982).

[7] Under North Carolina law in effect at that time, custody could only be given to the Director upon a judicial determination that the "child is in need of the care, protection, or discipline of the State." N.C. Gen. Stat. 110-29.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari be granted.

May, 1984

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APPENDIX

In the
UNITED STATES COURT OF APPEALS

For the Fourth Circuit

No. 83-1336

ELAINE RIDDICK,

Appellant,

v.

CLIFTON CRAIG, JACOB KOOMEN, M.D., R. L. ROLLINS, M.D., individually and as members of the 1968 Eugenics Board of North Carolina; SUE CASEBOLT, individually and as Executive Secretary, 1968 Eugenics Board of North Carolina, JACOB KOOMEN, M.D., R. L. ROLLINS, M.D., members of the Eugenics Commission of North Carolina.

Appellees,

and

DAVID WRIGHT, M.D.;
EUGENE A. HARGROVE, M.D.,

Defendants.

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern.
W. Earl Britt, *District Judge.* (C/A 74-2)

ARGUED: NOVEMBER 1, 1983—DECIDED: JANUARY 12, 1984

Before RUSSELL, HALL and MURNAGHAN, *Circuit Judges.*

AMENDED OPINION

PER CURIAM:

Elaine Riddick appeals from a judgment of the district court entered on a jury verdict in favor of defendants.

In 1974, Riddick filed suit under 42 U.S.C. § 1983 against various defendants, including Clifton Craig, Jacob Koomen, M.D., and R. L. Rollins, M.D., three members of the Eugenics Board of North Carolina, and Sue Casebolt, the Board's Executive Secretary. Riddick sought monetary damages, claiming that she had been wrongfully sterilized in 1968, in disregard of the standards of North Carolina's then existing eugenics statute, N.C. Gen. stat. §§ 35-36, et seq. (1966 Ed.).

The facts underlying this case are set out in a previous opinion of the court, *Doe v. Wright,* No. 81-1779 (4th Cir., April 26, 1982). In the earlier appeal, the district court's order, entering summary judgment in favor of Craig, Koomen, Rollins, and Casebolt, was reversed and the case was remanded for trial as to these four defendants.[1] At trial, the central issue was whether or not defendants were entitled to qualified or good faith immunity from liability for damages. After hearing testimony from plaintiff, all four defendants, and experts presented by both sides, the jury returned a verdict in favor of defendants and plaintiff appeals.

On appeal, Riddick contends that she is entitled to judgment against Craig, Koomen and Rollins as a matter of law because (1) the notice and hearing requirements of N.C. Gen. Stat. §§ 35-44 and 35-45 were not followed, (2) the consent of Riddick's father did not constitute a waiver of the notice and hearing requirements, and (3) the evidence was insufficient to establish that she was feebleminded or mentally retarded within the meaning of the eugenics statute. Riddick further contends that the trial court's jury instructions, including the

[1] That part of the district court's order granting summary judgment for two other defendants was affirmed. Doe v. Wright, No. 81-1779 (4th Cir., April 26, 1982).

charge on good faith immunity, were improper. Finally, Riddick submits that she was prejudiced by certain portions of defense counsel's argument.

Upon consideration of the record, the briefs, and oral argument, we find appellant's contentions to be without merit. Contrary to Riddick's assertions, the jury charge on good faith immunity was adequate under the Supreme Court's decision in *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982),[2] and the jury instructions were otherwise proper. In addition, there is substantial evidence in the record to support the jury's verdict in favor of defendants. Finding no error in the proceedings below, we accordingly affirm the judgment of the district court.

Affirmed.

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[2] The jury instruction which Riddick challenges reads as follows:

> If the defendant reasonably believed that he was acting in conformity with the General Statutes of North Carolina as they existed at the time the action was taken, and acted in good faith on the basis of this belief, then his reasonable belief and good faith action would constitute a defense to the plaintiff's claim.

This instruction clearly required the jury to use an objective "reasonably prudent person" standard in evaluating defendant's actions taken in 1968 under then existing law.

Moreover, in this Court's recent decision in McElveen v. County of Prince William, No. 82-6679 (4th Cir. January 26, 1984), we found that a jury instruction, strikingly similar to the one in this case, was proper under *Harlow,* despite the fact that it contained both subjective and objective standards to measure good faith immunity. In *McElveen,* the jury was instructed that the State defendants would not be liable for damages for jail conditions found unconstitutional if the State defendants "believed in good faith that their actions were lawful, and that belief was a reasonable one for them to hold." Slip Opinion at 5. In *McElveen* we rejected the argument, which Riddick

In the
UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 81-1779

JANE DOE,

Appellant,

v.

DAVID WRIGHT, M.D., CLIFTON CRAIG, EUGENE A. HARGROVE, M.D., JACOB KOOMEN, M.D., R. L. ROLLINS, M.D., individually and as members of the 1968 Eugenics Board of North Carolina; SUE CASEBOLT, individually and as Executive Secretary, 1968 Eugenics Board of North Carolina; JACOB KOOMEN, M.D., R. L. ROLLINS, M.D., members of the Eugenics Commission of North Carolina.

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern.
W. Earl Britt, *District Judge.*

ARGUED JANUARY 6, 1982—DECIDED APRIL 26, 1982

Before WINTER, *Chief Judge,* HAYNSWORTH, *Senior Circuit Judge,* and HALL, *Circuit Judge.*

PER CURIAM:

Following our decision in the related case of Cox v. Stanton, 529 F.2d 47 (4 Cir. 1975), the district court granted summary judgment for defendants on the ground that they were immune from liability for monetary damages. Plaintiff had sued under 42 U.S.C. § 1983 for damages for her involuntary sterilization under a North Carolina statute, now extensively revised.

We affirm in part and reverse in part.

I.

The defendants are those who, in 1968 when plaintiff was sterilized, were the members of the Eugenics Board of North Carolina which, pursuant to N.C. Gen. Stat. §§ 35-36 through 57 (1966 Ed.), directed plaintiff's sterilization; Dr. David Wright, who diagnosed plaintiff as "mentally retarded" for purposes of the sterilization petition; and Ms. Sue Casebolt, the Executive Secretary of the Eugenics Board. The summary judgment record establishes that while Dr. Wright examined plaintiff at the request of the County Social Services Departments and concluded that she was "mentally retarded," he made no recommendation that sterilization be performed, he did not perform the operation and he did not participate in the decision to authorize and direct that the operation be performed. We therefore conclude that the complaint alleges no cause of action against him and summary judgment in his favor was correctly entered.

The defendant, Eugene A. Hargrove, the North Carolina Commissioner of Mental Health, was a member of the Eugenics Board when plaintiff's sterilization was voted. The record shows, however, that on that date Hargrove was not present as the meeting of the Board and did not participate in the decision. Hargrove had delegated his power to a certain Dr. Weathers

who has not been joined as a defendant. The delegation was not unlawful and there is nothing to show that Hargrove was or could have been aware of any unconstitutional conduct on the part of Weathers. Thus we also conclude that summary judgment was properly entered for Hargrove.

With respect to the other members of the Eugenics Board, we are in agreement with the district court that in an appropriate case they may avail themselves of the defense of qualified immunity. *Cf.* O'Connor v. Donaldson, 422 U.S. 563 (1975). But it does not follow that this has been shown to be such a case. The defense of qualified immunity is not available to an official, otherwise entitled to invoke it, who "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff] . . . or if he took the action with the malicious intention to cause a deprivation of constitutional rights . . . " Wood v. Strickland, 420 U.S. 308, 322 (1975). Thus, one claiming immunity must first demonstrate that he was acting within the sphere of his official responsibility, or establish strict compliance with the statute under which he was purportedly acting. Then, the official must pass both an objective and a subjective test of the "good faith" of his actions. Downs v. Sawtalla, 574 F.2d 1, 11 (1 Cir. 1978). Finally, for summary judgment to be appropriate, compliance with the statute and good faith must be shown by the undisputed facts. *See* Fed. R. Civ. P. 56(c).

We do not think that the record establishes the lack of genuine factual dispute either as to whether defendants acted in accordance with the statute or whether they acted without legal malice. The papers before the Eugenics Board raise serious questions as to whether the sterilization was sought because, as N.C. Gen. Stat. § 35-46 requires, it was in the best interests of plaintiff or for the public good. Those papers assert that plaintiff's "chief problem is her home," and they suggest that sterilization may have been sought because plaintiff was poor and had become pregnant out of wedlock.

There is also considerable question as to whether the Board acted in conformity with other aspects of the law. Although plaintiff's father was mentally disabled and had not requested plaintiff's sterlization, the Board permitted him, apprently in contravention of N.C. Gen. Stat. § 35-45 to waive plaintiff's rights to notice, to appointment of a guardian, to representation by counsel, and to appeal the Board's determination.

Finally, it is not disputed that the Board's files were summarized by defendant Casebolt, who was Executive Secretary of the Board. The summary omitted a good deal of information contained in the files and set forth data not supported by other documents. The record leaves in doubt whether the members of the Board acted solely on the summary or on the entire file, and whether certain information found only in the summary had been obtained in accordance with the statute.

In short, the record leaves unresolved substantial questions as to whether the Board members acted in conformity with the statute so as to entitle them to interpose good faith immunity as a defense. In addition, the present record warrants an inference that the Board members, by failing to scrutinize plaintiff's file, acted with "callous disregard" of plaintiff's rights, or without subjective good faith. The precise role of Ms. Casebolt as an agent of the Board is not sufficiently clear on this record for us to determine if she is entitled to claim good faith immunity and if so entitled, whether the defense has been proved. Accordingly, summary judgment for the members of the Board (other than defendant Hargrove) and Ms. Casebolt must be reversed and the case remanded for further proceedings.

AFFIRMED IN PART,
REVERSED IN PART AND
REMANDED.

In the
UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 83-1336

ELAINE RIDDICK,

Appellant,

vs

CLIFTON CRAIG, *et al.*,

Appellees.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the East District of North Carolina, and was argued by counsel,

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said district court appealed from, in this cause, be, and the same is hereby, AFFIRMED.

Filed: January 12, 1984

For the Court,

/s/ WILLIAM K. SLATE, II
CLERK

In the
UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 83-1336

ELAINE RIDDICK,

Appellant,

versus

CLIFTON CRAIG, *et al,*

Appellees,

and

DAVID WRIGHT, M.D., *et al,*

Defendants.

ORDER

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Hall for a panel consisting of Judge Russell, Judge Hall, and Judge Murnaghan.

Filed: February 24, 1984

For the Court,

/s/ WILLIAM K. SLATE, II
CLERK

ARTICLE 7.

STERILIZATION OF PERSONS MENTALLY DEFECTIVE.

§ 35.36. State institutions anthorized to sterilize mental defectives.—The governing body or responsible head of any penal or charitable institution supported wholly or in part by the State of North Carolina or any subdivision thereof, is hereby authorized and directed to have the necessary operation for asexualization, or sterilization, performed upon any mentally diseased or feeble-minded inmate or patient thereof, as may be considered best in the interest of the mental, moral, or physical improvement of the patient or inmate, or for the public good: Provided, however, that no operation described in this section shall be lawful unless and until the provisions of this article shall first be complied with.

§ 35.37. Operations on mental defectives not in institutions. —It shall be the duty of the board of commissioners of any county of North Carolina, at the public cost and expense to have one of the operations described in § 35.36, performed upon any mentally diseased or feeble-minded resident of the county, not an inmate of any public institution, upon the request and position of the director of public welfare or other similar public official performing in whole or in part the functions of such director, or of the next of kin, or the legal guardian of such mentally defective person. Provided, however, that no operation described in this section shall be lawful unless and until the provisions of this article shall be first complied with.

§ 35-38. Restrictions on such operations.—No operation under this article shall be performed by other than a duly qualified and registered North Carolina physician or surgeon, and by him only upon a written order signed after complete compliance with the procedure outlined in this article by the responsible executive head of the institution or board, or the director of public welfare, or other similar official performing in whole or in part the functions of such director, or the next of kin

or legal guardian having custody or charge of the feeble-minded or mentally defective inmate, patient or noninstitutional individual.

§ 35-39. Prosecutors designated; duties.—If the person upon whom the operation is to be performed is an inmate or patient of one of the institutions mentioned in § 35-36, the executive head of such institution or his duly authorized agent shall act as prosecutor of the case. The county director of public welfare may act as prosecutor or petitioner in instituting sterilization proceedings in the case of any feeble-minded or mentally diseased person who is on parole from a State institution, and, in the case of any such person who is an inmate of a State institution, when authorized to do so by the superintendent of such institution. If the person upon whom the operaton is to be performed is an inmate or patient of a charitable or penal institution supported by the county, the executive head of such institution or his duly authorized agent, or the county director of welfare or such other official performing in whole or in part the functions of such director of the county in which such county institution is situated, shall act as petitioner in instituting proceedings before the Eugenics Board. If the person to be operated upon is not an inmate of any such public institution, then the director of welfare or such other official performing in whole or in part the functions of such director of the county of which said inmate, patient, or noninstitutional individual to be sterilized is a resident, shall be the prosecutor.

It shall be the duty of such prosecutor promptly to institute proceedings as provided by this article in any of the following circumstances;

(1) When in his opinion it is for the best interest of the mental, moral or physical improvement of the patient, inmate, or noninstitutional individual, that he or she be operated upon.

(2) When in his opinion it is for the public good that such patient, inmate or noninstitutional individual be operated upon.

(3) When in his opinion such patient, inmate, or noninstitutional individual would be likely, unless operated upon, to procreate a child or children who would have a tendency to serious physical, mental, or nervous disease or deficiency.

(4) When requested to do so in writing by the next of kin or legal guardian of such patient, inmate or noninstitutional individual.

(5) In all cases as provided for in § 35-33.

§ 35-40. Eugenics Board created; membership, etc.—There is hereby created the Eugenics Board of North Carolina. All proceedings under this article shall be begun before the said Eugenics Board. This Board shall consist of five members and shall be composed of:

(1) The Commissioner of Public Welfare of North Carolina,

(2) The State Health Director,

(3) The chief medical officer of an institution for the feeble-minded or insane of the State of North Carolina,

(4) The chief medical officer of the State Department of Mental Health,

(5) The Attorney General of the State of North Carolina.

Any one of those officials may for the purpose of a single hearing delegate his power to act as a member of said Board to an assistant: Provided, said delegation is made in writing to be included as a part of the permanent record said case. The said Board shall from time to time elect a chairman from its own membership and adopt and from time to time modify rules governing the conduct of proceedings before it, and from time

to time select the member of the said Board designated above as the chief medical officer of an institution for the feeble-minded or insane of the State of North Carolina.

§ 35-40.1. Eugenics Board authorized to accept gifts.—The Eugenics Board of North Carolina is hereby authorized and empowered to accept gifts from any source to be used by the Board for the furtherance of the purposes for which said Board was created.

§ 35-41. Quarterly meetings.—The Board of Eugenics shall meet at least quarterly in each year in Raleigh for the purpose of hearing all cases that may be brought before it and shall continue in session with appropriate adjournments until all current applications and other pending business have been disposed of. The members shall receive no additional compensation for their services.

§ 35-42. Secretary of Board and duties.—The Board shall appoint a secretary not a member of the Board who shall conduct the business of the Board between the times of the regular meetings. Such secretary shall receive all petitions, keep the records, call meetings, and in general act as the executive of said Board in such matters as may be delegated to him by said Board.

§ 35-43. Proceedings before Board.—Proceedings under this article shall be instituted by the petition of said petitioner to the Eugenics Board. Such petition shall be in writing, signed by the petitioner and duly verified by his affidavit to the best of his knowledge and belief. It shall set forth the facts of the case and the grounds of his opinion. The petition shall also contain a statement of the mental and physical status of the patient verified by the affidavit of at least one physician who has had actual knowledge of the case and who in the cases of inmates or patients of institutions described in § 35-36 may be a member of the medical staff of said institution. The Eugenics Board may require that the petitioner submit additional social and medical

history in regard to the inmate, patient or individual resident and his family. The prayer of said petition shall be that an order be entered by said Board authorizing the petitioner to perform, or to have performed by some competent physician or surgeon to be designated by him in the petition or by said Board in its order upon said inmate, patient or individual resident named in said petition in its discretion that the operation of sterilization or asexualization as specified in § 35-36 which shall be best suited to the interests of the said inmate or patient or to the public good.

§ 35-44. Copy of petition served on patient.—(a) A copy of said petition, duly certified by the secretary of the said Board to be correct, must be served upon the inmate, patient or individual resident, together with a notice in writing signed the secretary of the said Board designating the time and place not less than twenty days before the presentation of such petition to said Board when and where said Board will hear and pass and upon such petition. It shall be sufficient service if the copy of said petition and notice in writing be delivered to said inmate, patient or individual resident, and it shall not be necessary to read the above mentioned document to said patient, inmate or individual resident.

(b) A copy of said petition, duly certified to be correct, and the said notice must also be served upon the legal or natural guardian or next of kin of the inmate, patient or individual resident.

(c) If there is no next of kin, or if next of kin cannot after due and diligent search be found, or if there be no known legal or natural guardian of said inmate, patient or individual resident and the said inmate, patient or individual resident is of such mental condition as not to be competent reasonably to conduct his own affairs, then the said prosecutor shall petition the clerk of the superior court or the resident judge of the district or the judge presiding at a term of superior court of the county in which the inmate, patient or individual resident

resides, who shall appoint some suitable person to act as guardian ad litem of the said inmate, patient or individual resident during and for the purpose of proceeding under this article to defend the rights and interests of the said inmate, patient or individual resident. And such guardian ad litem shall be served likewise with a copy of the aforesaid petition and notice, and shall under all circumstances be given at least twenty days' notice of said hearing. Such guardian ad litem may be removed or discharged at any time by the said court or the judge thereof either in term or in vacation and a new guardian ad litem appointed and substituted in his place.

(d) If the said inmate, patient or individual resident be under twenty-one years of age and has a living parent or parents whose names and addresses are known or can by reasonable investigation be learned by said prosecutor, they or either of them, as the case may be, shall be served likewise with a copy of said petition and notice and shall be entitled to at least twenty days' notice of the said hearing. Provided, that the procedure described in this section shall not be necessary in the case of any operation for sterilization or asexualization provided for in this article if the parent, legal or natural guardian, or spouse or next of kin of the inmate, patient or noninstitutional individual shall submit to the superintendent of the institution of which the subject is a patient or inmate, or to the director of public welfare of the county in which this subject is residing, regardless of whether the subject is a legal resident of such county, a duly witnessed petition requesting that sterilization or asexualization be performed upon said inmate, patient or noninstitutional individual, provided the other provisions of this article are compiled with. Any operation authorized in accordance with this proviso may be performed immediately upon receipt of the authorization from the Eugenics Board.

§ 35.45. Consideration of matter by Board.—The said Board at the time and place named in said notice, with such

reasonable continuances from time to time and from place to place as the said Board may determine, shall proceed to hear and consider the said petition and evidence offered in support of and against the same: Provided, that the said Board shall give opportunity to said inmate, patient or individual resident to attend the said hearings in person if desired by him or if requested by his guardian or next of kin, or the solicitor.

The said Board may receive and consider as evidence at the said hearings the commitment papers and other records of the said inmate or patient with or in any of the aforesaid institutions as certified by the superintendent or executive official, together with such other evidence as may be offered by any party to the proceedings.

Any member of the said Board shall have power for the purposes of this article to administer oaths to any witnesses at such hearing.

Depositions may be taken, as in other civil cases, by any party after due notice and read in evidence, if otherwise pertinent.

Any party to the said proceedings shall have the right to be represented by counsel at such hearings.

A stenographic transcript of the proceedings at such hearings duly certified by the petitioner and the inmate, patient or individual resident, or his guardian or next of kin, or the solicitor shall be made and preserved as part of the records of the case.

§ 35.46. Board may deny or approve petition.—The said Board may deny the prayer of the said petition or if, in the judgment of the Board, the case falls within the intent and meaning of one or more of the circumstances mentioned in § 35-39, and an operation of asexualization or sterilization seems to said Board to be for the best interest of the mental, moral or physical improvement of the said patient, inmate or

individual resident or for the public good, it shall be the duty of the Board to approve said recommendation in whole or in part or to make such order as under all the circumstances of the case may seem appropriate, within fifteen days after the conclusion of said hearings, and to send to the prosecutor a written order, signed by at least three members of the Board, directing him to proceed with the operation as provided in this article. Said order shall contain the name of the specific operation which is to be performed and the date when said operation is to be performed.

If the Board disapproves the petition, the case may not be brought up again except on the request of the inmate, patient, or individual resident, or his guardian, or one or more of his next of kin, husband, wife, father, mother, brother, or sister, until one year has elapsed.

Nothing in this article shall be construed to empower or authorize the Board to interfere in any manner with the right of the patient, inmate, or individual resident or his guardian or next of kin to select a competent physician of his own choice for consultation or operation at his own expense.

§ 35-47. Orders may be sent parties by registered mail; consenting to operation.—Any order granting the prayer of the petition, in whole or in part, may be delivered to the petitioner by registered mail, return receipt demanded, to all parties in the case, including the legal guardian, the solicitor and the next of kin of the inmate, patient, or individual resident. It shall be the duty of the said guardian, the solicitor and the next of kin to protect by such measures as may seem to them in their sole discretion sufficient and appropriate the rights and best interests of the said inmate, patient, or individual resident.

If the inmate, patient or individual resident, or the next of kin, legal guardian, solicitor of the county, and guardian appointed as herein provided, after the said hearing but not before, shall consent in writing to the operation as ordered by

the Board, such operation shall take place at such time as the said prosecutor petitioning shall designate.

§ 35.48. Right of appeal to superior court.—If it appears to the inmate, patient or individual resident, or to his or her representative, guardian, parent or next of kin, or to the solicitor, that the proceedings taken are not in accordance with the law, or that the reasons given for asexualization or sterilization are not adequate or well founded, or for any other reason the order is not legal, or is not legal as applied to this inmate, patient or individual resident, he or she may within fifteen days from the date of such order have an appeal of right to the superior court of the county in which said inmate or patient resided prior to admission to the institution, or the county in which the noninstitutional individual resides. This appeal may be taken by giving notice in writing to any member of the Board and to the other parties to the proceeding, including the doctor who is designated to perform the said operation. Upon the giving of this notice the petitioner within fifteen days thereafter shall cause a copy of the petition, notice, evidence and orders of the said Board certified by any member thereof to be sent to the clerk of the said court, who shall file the same and docket the appeal to be heard and determined by the said court as soon thereafter as may be practicable.

The presiding judge of said superior court may hear the appeal upon affidavit or oral evidence and in determining such an appeal may consider the record of the proceedings before the Eugenics Board, including the evidence therein appearing together with such other legal evidence as may be offered to the said judge by any party to the appeal. In hearing such an appeal the general public may be excluded and only such persons admitted thereto as have direct interest in the case.

Upon such appeal the said superior court may affirm, revise, or reverse the orders of the said Board appealed from and may enter such order as it deems just and right and which it shall certify to the said Board.

The pendency of such appeal shall automatically, and without more, stay proceedings under the order of the said Board until the appeal be completely determined. Should the decision of the superior court uphold the plaintiff's objection, such decision unless appealed from will annul the order of the Board to proceed with the operation, and the matter may not be brought up again until one year has elapsed except by the consent of the plaintiff or his next of kin, or his legal representatives. Should the court affirm the order of the Board, then, if no notice of appeal to the Supreme Court is filed within ten days after such decision, said Board's recommendation as affirmed shall be put into effect at a time fixed by the original prosecutor or his successor in office and the inmate, patient or individual shall be asexualized or sterilized as provided in this article.

In this appeal the person for whom an order of asexualization or sterilization has been issued shall be designated as the plaintiff, and the prosecutor presenting the original petition shall be designated as defendant.

§ 35-49. Appeal costs.—The cost of appeal, if any, to the superior or higher courts, shall be taxed as in civil cases. If the case is finally determined in favor of the plaintiff, the costs shall be paid by the county.

§ 35-50. Appeal to Supreme Court.—Any party to such appeal to the superior court may, within ten days after the date of the final order therein, apply for an appeal to the Supreme Court, which shall have jurisdiction to hear and determine the same upon the record of the proceedings in the superior court and to enter such order as it may find the superior court should have entered.

The pendency of an appeal in the Supreme Court shall operate as a stay of proceedings under any orders of the said Board and the superior court until the appeal be determined by the said Supreme Court.

§ 35-51. Civil or criminal liability of parties limited.—Neither the said petitioner nor any other person legally

participating in the execution of the provisions of this article shall be liable, either civilly or criminally, on account of such participation, except in case of negligence in the performance of said operation.

§ 35-52. Necessary medical treatment unaffected by article.—Nothing contained in this article shall be construed so as to prevent the medical or surgical treatment for sound therapeutic reasons of any person in this State, by a physician or surgeon licensed in this State, which treatment may incidentally involve the nullification or destruction of the reproductive functions.

§ 35-53. Permanent records of proceedings before Board.—Records in all cases arising under this article shall be filed permanently with the secretary of the said Eugenics Board. Such records shall not be open to the public inspection except for such purposes as the court may from time to time approve. (1933.)

§ 35-54. Construction of terms.—Where the inmates, patients, or noninstitutional individuals are referred to in this article as of the masculine or feminine gender, the same shall be construed to include the feminine or masculine gender as well. Wherever the term individual resident appears in this article, it shall be construed to mean noninstitutional individual.

§ 35-55. Discharge of patient from institution.—Before any inmate or patient designated in §§ 35-36 and 35-39, shall be released, paroled or discharged, it shall be the duty of the governing body or responsible head of any institution above mentioned to comply with the procedure set out in this article, whenever a written request for the asexualization or sterilization of said inmate or patient is filed with the governing body or responsible head of the institution in which such inmate or patient has been legally confined. This written request may be made by any public official or by the legal guardian or next of kin of any inmate or patient not later than thirty days prior to

the date of said parole or discharge. Upon the receipt of the signed approval of the Eugenics Board as described in this article, it shall be the duty of said governing board or responsible head to issue an order for the performance of the operation upon said inmate or patient, and the operation must be performed before the release, parole or discharge of any such inmate or patient.

§ 35-56. Existing rights of surgeons unaffected.—Nothing in Public Laws 1935, chapter 463 shall, in any way, interfere with any surgeon in the removal of diseased pathological tissue from any patient.

§ 35-57. Temporary admission to State hospitals for sterilization.—Any feeble-minded or mentally diseased person, for whom the Eugenics Board of North Carolina has authorized sterilization, may be admitted to the appropriate State hospital for the performance of such operation. The order of the Eugenics Board authorizing a surgeon on the regular or consulting staff of the hospital to perform the operation will be sufficient authority to the superintendent of such hospital to receive, restrain, and control the patient until such time as it is deemed wise to release such patient. All such admissions shall be at the discretion of the superintendent of the State hospital, and in making any agreement with any county or any State institution to perform such operations, the State hospital may collect a fee which shall not be greater than the cost of such operation and the cost of care and maintenance for the duration of the operation and the time required for the patient to recuperate.

The order of the Eugenics Board and the agreement of the superintendent of the State hospital to admit such patient shall be full and sufficient authority for the prosecutor or the sheriff of the county to deliver such patient to the proper State hospital.

No. 83-1934

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ELAINE RIDDICK,

Petitioner

v.

CLIFTON CRAIG, JACOB KOOMEN, M.D.,
R. L. ROLLINS and SUE CASEBOLT,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Is a State official acting under color of office entitled to a defense of qualified immunity if he reasonably believed he was acting in accordance with governing statutes and acted in good faith on the basis of his belief?
2. Is there such a conflict among decisions of various Federal Circuit Courts of Appeals regarding the answer to Question Number 1 that the Petition for Certiorari in this case should be granted?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

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STATEMENT OF THE CASE

In 1968, when the petitioner was 13 years old, she was sterilized pursuant to an order of the Eugenics Board of North Carolina acting under North Carolina statutes authorizing this procedure for mentally defective persons.[1] The Board was composed of statutorily prescribed officials.[2]

[1]In 1968 there were two completely separate sets of statutes dealing with sterilization in North Carolina. N.C. G.S. 90-272 specifically dealt with sterilization of a minor who requests the same in connection with a petition filed in Juvenile Court by the parents. (App. A-1.) N.C.G.S. 35-45 was designed to accomplish "... sterilization of persons mentally defective", when appropriate, at government expense, after proper petition and review by a board of designated experts. This case deals with the latter. (App. A-2.)

[2]All the voting members of the Eugenics Board were present on this date. They were the State Health Director, two psychiatrists (one of whom was the superintendent of a state mental hospital), the State Commissioner of Public Welfare, and an Assistant Attorney General. N.B. only three of the five Board members were sued in this action.

Prior to arriving at a decision these officials had available to them and considered the following documents: a sworn petition for her sterilization executed by the County Director of Public Welfare[3] who had also been given custody of the plaintiff; a sworn statement, *antedating* the Director's petition, executed by the petitioner's father giving his permission to the County Director of Public Welfare to initiate proceedings before the Board for the sterilization and giving his consent to the operation;[4] evidence that the petitioner's mother was in prison; documentation that the petitioner's grandmother (with whom she lived) was in favor of the sterilization; documentation that the sterilization had been discussed with the petitioner, who understood and was willing to have the operation; a psychological report from a clinical psychologist which stated that the petitioner had an iQ of 75 and was functioning at the level of a 9-10 year old;[5] the affidavit of a

[3]This was in accordance with N.C.G.S. § 35-39; (App. A-3.)

[4]See N.C.G.S. 35-44(d) (App. A-6) regarding the lack of need for notice to the petitioner under these circumstances. There has never been any claim that the petitioner's father had had his parental rights terminated. Such termination of rights would be a requisite under North Carolina law for dispensing with the necessity of his determining and consenting to the appropriateness of surgery upon his minor daughter. *See, in re Godwin*, 31 N.C.App. 137, 228 S.E.2d 521 (1976); App.A-7 Further, there has never been any claim that the petitioner's father was either de facto or de jure incompetent, as clearly distinguished under North Carolina law from being mentally ill or mentally disordered. *See, Hagens v. Redevelopment Commission*, 275 N.C. 90, 165 S.E.2d 490 (1969); *In re Worsley* 282 N.C. 320, 193 S.E. 666 (1937). *See also*, n.9 and text accompanying, *infra*.

[5]The Diagnostic and Statistical Manual published by the American Psychiatric Association which was in effect at the time the Eugenics Board met placed an IQ of 75 within the retarded diagnosis and stated that the degree of defect is estimated from other factors involving adaptive behavior. (App. A-12)

medical doctor who, upon examining the petitioner, found that she was mentally retarded, that she was below average in IQ, and that there were no contraindications to sterilization; and documentation that the petitioner did poor work in school, was promiscuous, was pregnant,[6] could not control herself, and was not capable of taking care of children.

The Board, after considering all of this evidence and relying on legal advice of the Assistant Attorney General member, unanimously approved and ordered the sterilization.[7]

SUMMARY OF THE ARGUMENT

The petitioner seeks a writ of certiorari saying that the United States Court of Appeals failed to apply the rule announced in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982) and that there is a split of authority among the Courts of Appeals as they apply *Harlow*. A writ should not issue in this case. The United States Court of Appeals for the Fourth Circuit was correct in declaring that the District Court had

[6]The petitioner had her child prior to the sterilization operation. The petitioner maintained at trial that her pregnancy resulted from rape. However, she conceded that she did not make this claim at the time of the sterilization proceedings. In fact, she did not make this claim to anyone until she was about 18 years old. Also, she admitted that at first she named a man other than the alleged rapist as the father of her child, and made this identification in a court action to require that individual to pay child support. In that proceeding, the court found this other man to be the father and ordered him to pay support.

[7]The record of the trial shows that Assistant Attorney General (who was a voting member of the Board and participated in the unanimous approval of sterilization) was the general legal counsel to the State Department of Public Welfare, and was regarded as legal counsel to the Board by its other members. These members consistently followed his advice regarding the legality of any action taken by the Board.

charged the jury to apply an "objective 'reasonably prudent person' standard in evaluating the defendants' action taken in 1968 under then existing law." Slip op. at 3, n.2 (App. A-16). The plaintiff's arguments to the contrary are mistaken. She begins from a false premise, namely, that she had *clearly* established constitutional and statutory rights which the defendants violated in 1968. This is not so. Moreover, her petition rests on a sterile mechanical application of the words "objective" and "subjective" when, in fact, neither word appears in the trial court's instructions. Finally, contrary to the petitioner's assertion, there is no split of authority among the circuits. These things being so, the writ should not issue.

ARGUMENT

THE DISTRICT COURT'S INSTRUCTIONS TO THE JURY COMPLY WITH *HARLOW V. FITZGERALD* AND THE DECISIONS OF THE UNITED STATES COURTS OF APPEALS. THEREFORE, THE DECISION OF UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IS CORRECT, AND A WRIT OF CERTIORARI SHOULD NOT ISSUE.

The issues here are whether the trail court's charge to the jury violated the standards for qualified immunity established in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), and whether there is a split in the decisions of the various circuits construing *Harlow.* The portion of the charge in question is as follows:

> If the defendent reasonably believed that he was acting in conformity with the General Statutes of North Carolina as they existed at the time the action was taken, and acted in good faith on the basis of this belief, then his reasonable belief and good faith action would constitute a defense to the plaintiff's claim.

This charge, with its clear emphasis on the reasonableness of the defendant's belief, is correct under *Harlow*, as the following analysis makes clear. Further, this charge conforms to the explanations of *Harlow* made by all the other circuits which have reached this issue.

The main thrust of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), was to shield government officials performing discretionary functions ". . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights *of which a reasonable person would have known." Id.*, 457 U.S. at 818 (emphasis supplied). In *Harlow* the Court discussed the "subjective" and "objective" aspects of the long standing "good faith" defense with the former term referring to "permissible intentions" and the latter to "a presumptive knowledge of and respect for basic, unquestioned constitutional rights" *Id.*, 457 U.S. at 815. The petitioner's errors in her argument are to misapply the quoted language and to emphasize in a sterile mechanical fashion the words "objective" and "subjective".

First, the present attack centering on the words "subjective" and "objective" is immaterial and virtually meaningless since neither of these words is found in the charge; thus, jurors could not conceivably have been misled, confused or mistaken with regard to the meaning or effect of these words. To the contrary, the jury charge here fully conformed to the *Harlow* requirement of reasonable belief by a defendant as the exculpatory test.[8]

Second, the petitioner's argument stands on a false

[8]In passing it should be noted that the judge, in his well tailored charge, referred to the respondent's ". . . reasonable belief and good faith action . . . ". Since this phraseology was conjunctive rather than disjunctive there can be no possible claims that the jurors had any misunderstanding of this portion of the charge detrimental to the petitioners.

premise, namely that the specific nature of procedural process to be accorded the petitioner was settled by *In re Gault*, 387 U.S. 1 (1966), and other cases cited in footnote 4 of her petition. To the contrary, while the cases cited by the petitioner make it very clear that juveniles come under the procedural protection of the Constitution of the United States, it is equally well established that state due process procedures require a balancing of a number of factors and that the nature of these procedures ". . . cannot be divorced from the nature of the ultimate decision that is being made." *Parham v. J.R., et al.*, 442 U.S. 584, 608 (1979). Further, ". . . procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." *Id.*, 442 U.S. at 613; *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). In this case, the petitioner's father gave initial permission for the sterilization proceedings, thereby invoking the procedures of N.C.G.S. 34-44(d), which dispensed with the need for notice to the petitioner herself. Plainly, the father's action obviated the need for notice to his child.[9] No one can say that reliance on this statute in these circumstances was unreasonable or clearly unconstitutional or illegal.

Ironically, not only are the cases from the various circuits cited by the petitioner not in conflict, but, conversely, they are unanimous in their agreement with the basic *Harlow* standard. *See, Fujiwara v. Clark*, 703 F.2d 357, 359 n.3 (9th Cir. 1983) ("knew or should have known" of the relevant legal standard); *Coleman v. Turpen*, 697 F.2d. 1341, 1344, 1346 (10th Cir. 1983) ("should reasonably have known" "what a reasonable person in the circumstances should

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[9]The procedures involved here achieve the desired result of permitting ". . . the parents to retain a substantial, if not the dominant, role . . ." in the sterilization decision. *Cf., Parham v. J.R.*, 442 U.S. at 604. See, also, n. 4 and text accompanying, *supra*.

have known"); *Smith v. Heath*, 691 F.2d 220, 226 (6th Cir. 1982) ("reasonably prudent person should have known"); *Trego v. Perez*, 693 F.2d 482, 488 (5th Cir. 1982) ("what a reasonable person would have believed under those same circumstances"); *Czurlanis v. Albanese*, 721 F.2d 98, 108 (3rd Cir. 1982) ("neither knew or should have known of the revelant standards"); *Barnett v. Housing Authority*, 707 F.2d 1571, 1583 (11th Cir. 1983) ("neither knew or should have known"); *Stathos v. Bowden*, 728 F.2d 15, 20 (1st Cir. 1984 (". . . should have known" due to "extraordinary circumstances").[10]

Finally, scrutiny of the opinion of the Fourth Circuit reveals that the petitioner has focused attention upon a

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[10]In addition to *Stathos*, the Circuit Court in *Czurlanis* and *Barnett* also specifically recognized the presence of "extraordinary circumstances" as negating liability of a defendent even in a situation where clearly established law was violated by them. *McKinley v. Trattles*, F.2d (7th Cir., Nos. 83-1345, 83-1406, April 23, 1984), provides no support to petitioner. There the Circuit Court disapproved of a charge which it felt required the jury to decide the "state of the law". Here the judge levied upon the jury only the responsibility to ascertain whether any petitioner reasonably believed he was acting in conformity with state statutes which were fully identified, admitted into evidence and available for their consideration. Further, *McKinley* also specifically recognized that an official's knowledge is relevant when "extraordinary circumstances" are present. *Op. cit.*, slip op., pp 6-7. In the present case, not only were the respondents not violating clearly established law, but the record made it clear that they were acting pursuant to the statutory interpretations and legal advice rendered by — and with the concurrence of — qualified legal counsel. Certainly had there been any violation of clearly established rights the assurances of legal counsel that a respondent's actions were legally authorized would have sufficed to provide the extraordinary circumstances contemplated by the cases cited by petitioner. *Miller v. Solem*, 728 F.2d 1020 (8th Cir. 1984), is not pertinent since that court merely held that reckless disregard by a prison official for an inmate's need for safety precludes maintaining an "objective" good faith immunity defense. *Id.*, 728 F.2d at 1025.

comment of the Circuit Court that *Harlow* "did not hold that an *exclusively* objective standard was to be applied"[11] which, though apropos and correct, was ancillary to the *primary* reason why the challenged charge to the jury was found to be proper and correct. That primary reason is found in the following language of the opinion of the Fourth Circuit: ". . . this instruction *requires* the jury to use an *objective* 'reasonably prudent person' standard in evaluating the defendant's actions taken in 1968 under then existing law."[12] Slip op. at 3, n.2 (emphasis added).

In sum the charge as given in this case involving responsible public officials vested with discretionary authority while performing statutorily required functions truly represented the law as enunciated by *Harlow* and as interpreted by each of the circuits which has reached the issue.

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[11] *Riddick v. Craig* et al., slip op. at 4, n.2(cont.). The Court of Appeals relied on *McElveen v. County of Prince William*, 725 F.2d 954 (4th Cir. 1984). The copy of the petition served by petitioner upon the respondents contained an incomplete copy of the Fourth Circuit's Slip Opinion in the present case. Therefore, a complete copy of that opinion is included in the Appendix to this reply. (App. A-14).

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[12] The language dealing with "subjective" versus "objective" standards is set forth in the second part of footnote 2. Significantly, this language is prefaced with the word "Moreover". Thus, while the language in the second paragraph of footnote 2 of the opinion of the Fourth Circuit is a correct, well-reasoned statement of the law, a determination on that subject is not necessary to disposition of this case. In passing, it also should be noted that, as quoted by the petitioner, the opinion of the Second Circuit in *Anderson v. Coughlin*, 700 F.2d 37, 44 (2d. Cir. 1982), is in keeping with the opinions of the Fourth Circuit and the other circuits discussed in the text of this reply.

CONCLUSION

For the reasons stated above, respondents assert that the petition for writ of certiorari should be denied.

Respectfully submitted this the 24th day of June, 1984.

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APPENDICES

§ 90-272. Sexual Operations on Minors, Any such physician or surgeon may perform a surgical interruption of vas deferens or Fallopian tubes upon any unmarried person under the age of twenty-one years when so requested in writing by such minor and in accordance with the conditions and requirements set forth in G. S. 90-271, provided that the juvenile court of the county wherein such minor resides, upon petition of the parent or parents, if they be living, or the guardian or next friend of such minor, shall determine that the operation is in the best interest of such minor and shall enter an order authorizing the physician or surgeon to perform such operation.

§ 35-45. Consideration of matter by Board. — The said Board at the time and place named in said notice, with such reasonable continuances from time to time and from place to place as the said Board may determine, shall proceed to hear and consider the said petition and evidence offered in support of and against the same: Provided, that the said Board shall give opportunity to said inmate, patient or individual resident to attend the said hearings in person if desired by him or if requested by his guardian or next of kin, or the solicitor.

The said Board may receive and consider as evidence at the said hearings the commitment papers and other records of the said inmate or patient with or in any of the aforesaid institutions as certified by the superintendent or executive official, together with such other evidence as may be offered by any party to the proceedings.

Any member of the said Board shall have power for the purposes of this article to administer oaths to any witnesses at such hearing.

Depositions may be taken, as in other civil cases, by any party after due notice and read in evidence, if otherwise pertinent.

Any party to the said proceedings shall have the right to be represented by counsel at such hearings.

A stenographic transcript of the proceedings at such hearings duly certified by the petitioner and the inmate, patient or individual resident, or his guardian or next of kin, or the solicitor, shall be made and preserved as part of the records of the case (1933, c. 224 s. 10)

§ 35-39. Prosecutors designated; duties. — If the person upon whom the operation is to be performed is an inmate or patient of one of the institutions mentioned in § 35-36, the executive head of such institution or his duly authorized agent shall act as prosecutor of the case. The county director of public welfare may act as prosecutor or petitioner in instituting sterilization proceedings in the case of any feeble-minded or mentally diseased person who is on parole from a State institution, and in the case of any such person who is an inmate of a State institution, when authorized to do so by the superintendent of such institution. If the person upon whom the operation is to be performed is an inmate or patient of a charitable or penal institution supported by the county, the executive head of such institution or his duly authorized agent, or the county director of welfare or such other official performing in whole or in part the functions of such director of the county in which such county institution is situated, shall act as petitioner in instituting proceedings before the Eugenics Board. If the person to be operated upon is not an inmate of any such public institution, then the director of welfare or such other official performing in whole or in part the functions of such director of the county of which said inmate, patient, or noninstitutional individual to be sterilized is a resident, shall be the prosecutor.

It shall be the duty of such prosecutor promptly to institute proceedings as provided by this article in any of the following circumstances:

(1) When in his opinion it is for the best interest of the mental, moral or physical improvement of the patient, inmate, or noninstitutional individual, that he or she be operated upon.
(2) When in his opinion it is for the public good that such patient, inmate or noninstitutional individual be operated upon.

(3) When in his opinion such patient, inmate, or noninstitutional individual would be likely, unless operated upon, to procreate a child or children who would have a tendency to serious physical, mental, or nervous disease or deficiency.

(4) When requested to do so in writing by the next of kin or legal guardian of such patient, inmate or noninstitutional individual.

(5) In all cases as provided for in § 35-55 (1933 c. 224, s.4; 1935, c. 463, s. 1; 1937, c. 243; 1961, c. 186; 1967, c. 138, s. 4.)

Editor's Note. — The 1967 amendment deleted "epileptic" following "feeble-minded" in the second sentence.

§ 35-44. Copy of petition served on patient. — (a) A copy of said petition, duly certified by the secretary of the said Board to be correct, must be served upon the inmate, patient or individual resident, together with a notice in writing signed by the secretary of the said Board designating the time and place not less than twenty days before the presentation of such petition to said Board when and where said Board will hear and pass and upon such petition. It shall be sufficient service if the copy of said petition and notice in writing be delivered to said inmate, patient or individual resident, and it shall not be necessary to read the above mentioned document to said patient, inmate or individual resident.

(b) A copy of said petition, duly certified to be correct, and the said notice must also be served upon the legal or natural guardian or next of kin of the inmate, patient or individual resident.

(c) If there is no next of kin, or if next of kin cannot after due and diligent search be found, or if there be no known legal or natural guardian of said inmate, patient or individual resident and the said inmate, patient or individual resident is of such mental condition as not to be competent reasonably to conduct his own affairs, then the said prosecutor shall petition the clerk of the superior court or the resident judge of the district or the judge presiding at a term of superior court of the county in which the inmate, patient or individual resident resides, who shall appoint some suitable person to act as guardian ad litem of the said inmate, patient or individual resident during and for the purpose of proceeding under this article, to defend the rights and interests of the said inmate, patient or individual resident. And such guardian ad litem shall be served likewise with a copy of the aforesaid petition and notice, and shall under all circumstances be given at least twenty

days' notice of said hearing. Such guardian ad litem may be removed or discharged at any time by the said court or the judge thereof either in term or in vacation and a new guardian ad litem appointed and substituted in his place.

(d) If the said inmate, patient or individual resident be under twenty-one years of age and has a living parent or parents whose names and addresses are known or can by reasonable investigation be learned by said prosecutor, they or either of them, as the case may be, shall be served likewise with a copy of said petition and notice and shall be entitled to at least twenty days' notice of the said hearing: Provided, that the procedure described in this section shall not be necessary in the case of any operation for sterilization or asexualization provided for in this article if the parent, legal or natural guardian, or spouse or next of kin of the inmate, patient or noninstitutional individual shall submit to the superintendent of the institution of which the subject is a patient or inmate, or to the director of public welfare of the county in which this subject is residing, regardless of whether the subject is a legal resident of such county, a duly witnessed petition requesting that sterilization or asexualization be performed upon said inmate, patient or noninstitutional individual, provided the other provisions of this article are complied with. Any operation authorized in accordance with this proviso may be performed immediately upon receipt of the authorization from the Eugenics Board. (1933, c. 224, s. 9; 1935, c. 463, ss. 3, 6; 1947, c. 93; 1961, c. 186.)

Appellant assigns other errors which we have carefully reviewed. It is our opinion that he received a fair trial free of prejudicial error.

No error.

Chief Judge Brock and Judge Parker concur.

IN THE MATTER OF MICHELLE LEE GODWIN, MINOR

No. 767DC381

(Filed 6 October 1976)

Parent and Child§ 1—termination of parental rights—serious neglect—refusal to consent to adoption—refusal of counseling

The refusal of the natural parents of a child who has been in a foster home for some four years to consent to the adoption of the child by others and the refusal of the father, who suffers from a mental illness, to submit to further counseling to determine his ability as a parent do not constitute "serious neglect" within the meaning of G.S. 7A-288(4) which would permit the court to terminate the parental rights of the natural parents.

Appeal by petitioner from *Carlton, Judge.* Order entered 4 February 1976 in District Court, Nash County. Heard in the Court of Appeals 16 September 1976.

On 5 November 1975 the Nash County Department of Social Services (petitioner) filed a petition pursuant to G.S. 7A-288(4) asking the court to terminate the parental rights of Cecil and Wanda Godwin as to their four-year old daughter, Michelle, including their right to consent or object to the adoption of Michelle. At a hearing petitioner's evidence tended to show:

In 1972 Michelle, along with her two older sisters, was placed in the custody of the Nash County Department of Social Services upon an adjudication that they were neglected and dependent children. This adjudication was based primarily upon the father's mental illness and the mother's limited intellectual capacity. The father was diagnosed as a chronic paranoid schizophrenic, which illness will never be cured although medication can control some of the symptons such as hallucinations and illusions. The father has been admitted to Cherry Hospital on four occasions and in the opinion of psychiatrists his chances for holding normal employment are minimal. The father is likely to require future hospitalization although he has refused for the last year to return to the mental health center for further counseling. His ability as a parent is below normal due to his inability to think through relationships and his inflexibility with people. The mother has a third grade education and has spent ten years at the Caswell Center. Following this adjudication, Michelle was placed in a foster home when she was 18 months old. At the time she was placed in foster care, she was "below normal" but now is above normal in every respect and is very outgoing. Michelle has no emotional ties with her parents and, in fact, regards her foster mother as her real mother. In October 1974, it was determined that the monthly visits of Michelle with her parents were doing more harm than good because of the confusion that was created. The two older children, who have developed emotional ties with their parents, have continued their visits and petitioner is not seeking to terminate parental rights as to them; in fact, the social workers have told the parents that the two older children *may* be returned to them depending on future evaluations. No caseworker has ever seen the parents physically abuse their children nor has any caseworker ever seen any intentional neglect on their part. The parents have consistently refused to sign a voluntary consent for Michelle to be adopted by other parties.

Respondents' evidence tended to show: In 1972 the father suffered a "nervous breakdown" from the pressures of his job. Since that time he has made regular visits to the mental health clinic from which he has received medication and he believes he is greatly improved. The father has not refused to be re-evaluated but is merely wating for the social worker to make an appointment. In addition to the disability benefits and social security that the family receives, the mother has been earning money regularly by babysitting for the two-year-old child of a friend. The parents love their children and would like to be normal parents once again. They have refused to consent to the termination of parental rights and subsequent adoption of Michelle even if it means she will remain in a foster home because they are not willing "to give away [their] flesh and blood."

In re Godwin

From a denial of the petition to terminate parental rights, petitioner appealed.

George Paul Duffy, Jr., for the petitioner appellant.

Ezzell, Henson & Fuerst, by James E. Ezzell, Jr., for respondent appellees.

BRITT, Judge.

The sole question presented on appeal is whether the trial court erred in concluding that there had been no "physical abuse or serious neglect" as required to terminate parental rights under G.S. 7A-288(4). We hold that it did not.

The statutory provision applicable to the present case is G.S. 7A-288(4) which provides that the court may enter an order terminating parental rights if the court finds: "That the parent has so physically abused or seriously neglected the child that it would be in the best interest of the child that he not be returned to such parent." As stated in *Dept. of Social Services v. Roberts*, 22 N.C. App. 658, 660, 207 S.E. 2d 368, 370 (1974): "It should be noted that the court is not required to terminate parental rights under any circumstances. G.S. 7A-288 only gives the court the authority to do so in the exercise of its discretion...."

To terminate parental rights under the present statutory provision, the trial court must base its determination on evidence which shows either physical abuse or serious neglect. No evidence of physical abuse was presented in the instant case. Petitioner contends that the refusal of the Godwins to consent to the adoption of Michelle (by other parties) and the refusal of the father to submit to further counseling to determine his ability as a parent constitute

serious neglect. We agree with the trial court that this is not the type of "serious neglect" contemplated by the statute.

The evidence presented was insufficient to support a finding of serious neglect, therefore, the decision of the trial court is

Affirmed.

Judges Parker and Clark concur.

A-12

DIAGNOSTIC AND STATISTICAL

MANUAL

MENTAL

DISORDERS

Prepared by

The Committee on Nomenclature and Statistics of the

American Psychiatric Association

Published by

AMERICAN PSYCHIATRIC ASSOCIATION

MENTAL HOSPITAL SERVICE

1785 Massachusetts Ave., N.W

Washington 6, D.C.

1952

MENTAL DEFICIENCY

000-x90 and 000-y90 Mental deficiency

Here will be classified those cased presenting primarily a defect of intelligence existing since birth, without demonstrated organic brain disease or known prenatal cause. This group will include only those cases formerly know as familial or "idiopathic" mental deficiencies. The degree of intelligence defect will be specified as *mild, moderate, or severe,* and the current I.Q. rating, with the name of the test used, will be added to the diagnosis. In general, *mild* refers to functional (vocational) impairment, as would be expected with I.Q.'s of approximately 70 to 85; *moderate* is used for functional impairment requiring special training and guidance, such as would be expected with I.Q.'s of about 50-70; *severe* refers to the functional impairment requiring custodial or complete protective care, as would be expected with I.Q.'s below 50. The degree of defect is estimated from other factors than merely psychological test scores, namely, consideration of cultural, physical and emotional determinants, as well as school, vocational and social effectiveness. The diagnosis may be modified by the appropriate qualifying phrase, when, in addition to the intellectual defects, there are significant psychotic, neurotic, or behavioral reactions.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1336

Elaine Riddick,

Appellant,

v.

Clifton Craig, Jacob Koomen, M.D., R. L. Rollins, M.D., individually and as members of the 1968 Eugenics Board of North Carolina; Sue Casebolt, individually and as Executive Secretary, 1968 Eugenics Board of North Carolina, Jacob Koomen, M.D., R. L. Rollins, M.D., members of the Eugenics Commission of North Carolina,

Appellees,

and

David Wright, M.D.; Eugene A. Hargrove, M.D.,

Defendants.

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern. W. Earl Britt, District Judge. (C/A 74-2)

Argued: November 1, 1983

Decided: January 12, 1984

Before RUSSELL, HALL and MURNAGHAN, Circuit Judges.

Kenneth N. Flaxman (George Daly on brief) for Appellant; William F. O'Connell, Special Deputy Attorney General (Rufus L. Edmisten, Attorney General of North Carolina, Steven M. Shaber, Assistant Attorney General, John H. Anderson, Robin Vinson, Smith, Anderson, Blount & Mitchell on brief) for Appellees.

AMENDED OPINION

PER CURIAM:

Elaine Riddick appeals from a judgment of the district court entered on a jury verdict in favor of defendants.

In 1974, Riddick filed suit under 42 U.S.C. § 1983 against various defendants, including Clifton Craig, Jacob Koomen, M.D., and R. L. Rollins, M.D., three members of the Eugenics Board of North Carolina, and Sue Casebolt, the Board's Executive Secretary. Riddick sought monetary damages, claiming that she had been wrongfully sterilized in 1968, in disregard of the standards of North Carolina's then existing eugenics statute, N.C. Gen. Stat. §§ 35-36, *et seq.* (1966 Ed.).

The facts underlying this case are set out in a previous opinion of the court, *Doe v. Wright,* No. 81-1779 (4th Cir., April 26, 1982). In the earlier appeal, the district court's order, entering summary judgment in favor of Craig, Koomen, Rollins, and Casebolt, was reversed and the case was remanded for trial as to these four defendants.[1] At trial, the central issue was whether or not defendants were entitled to qualified or good faith immunity from liability for damages. After hearing testimony from plaintiff, all four defendants, and experts presented by both sides, the jury returned a verdict in favor of defendants and plaintiff appeals.

On appeal, Riddick contends that she is entitled to judgment against Craig, Koomen and Rollins as a matter of law because (1) the notice and hearing requirements of N.C. Gen. Stat. §§ 35-44 and 35-45 were not followed, (2) the consent of Riddick's father did not constitute a waiver of the notice and hearing requirements, and (3) the evidence was insufficient to establish that she was feebleminded or mentally retarded within the meaning of the eugenics statute. Riddick further contends that the trial court's jury instructions, including the charge on good faith

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[1]That part of the district court's order granting summary judgment for two other defendants was affirmed. Doe v. Wright, No. 81-1779 (4th Cir., April 26, 1982).

immunity, were improper. Finally, Riddick submits that she was prejudiced by certain portions of defense counsel's argument.

Upon consideration of the record, the briefs, and oral argument, we find appellant's contentions to be without merit. Contrary to Riddick's assertions, the jury charge on good faith immunity was adequate under the Supreme Court's decision in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982),[2] and the jury instructions were otherwise proper. In addition, there is substantial evidence in the record to support the jury's verdict in favor of defendants. Finding no error in the proceedings below, we accordingly affirm the judgment of the district court.

AFFIRMED.

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[2]The jury instruction which Riddick challenges reads as follows:

> If the defendant reasonably believed that he was acting in conformity with the General Statutes of North Carolina as they existed at the time the action was taken, and acted in good faith on the basis of this belief, then his reasonable belief and good faith action would constitute a defense to the plaintiff's claim.

This instruction clearly required the jury to use an objective "reasonably prudent person" standard in evaluating defendant's actions taken in 1968 under then existing law. Moreover, in this Court's recent decision in McElveen v. County of Prince William, No. 82-6679 (4th Cir. January 26, 1984), we found that a jury instruction, strikingly similar to the one in this case, was proper under *Harlow,* despite the fact that it contained both subjective and objective standards to measure good faith immunity. In *McElveen,* the jury was instructed that the State defendants would not be liable for damages for jail conditions found unconstitutional if the State defendants "believed in good faith that their actions were lawful, and that belief was a reasonable one for them to hold." Slip Opinion at 5. In *McElveen* we rejected the argument, which Riddick also raises, that *Harlow* abolished the subjective element entirely. We demonstrated how the *Harlow* holding was directed toward disposing of insubstantial claims against government officials by summary judgment and concluded that "[a]lthough the Harlow Court indicated that the good faith defense turns primarily on objective factors, U.S. at , 102 S.Ct. at 2739, it did not hold that an *exclusively* objective standard was to be applied to claims that proceeded to trial." (Emphasis in original). Slip Opinion at 9. We find that our resolution of this issue in *McElveen* controls the present case.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served three copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari upon the person indicated below by depositing same in the United States mail, first-class postage prepaid, addressed to the following:

Kenneth N. Flaxman
55 East Monroe Street,
Suite 4005
Chicago, Illinios 60603

This the 22nd day of June, 1984.

William F. O'Connell
Special Deputy Attorney General